

PART 33

PROTESTS, DISPUTES, AND APPEALS

33.101 Definitions.

FAR as of FAC 90-25

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FAR as revised

“Day”, for the purpose of this subpart means a calendar day, unless otherwise specified. In the computation of any period—

(a) The day of the act, event, or default from which the designated period of time begins to run is not included; and

(b) The last day after the act, event, or default is included unless—

(1) The last day is a Saturday, a Sunday, or a legal holiday; or

(2) In the case of a filing of a paper at any appropriate administrative forum, the last day is a day on which weather or other conditions causes the closing of the forum for all or part of the day, in which event the next day on which the appropriate administrative forum is open is included.

(c) In the case of the 5-day period after a debriefing date and the 10-day period after contract award for filing a protest resulting in a suspension (as described at 33.104(c)), Saturdays, Sundays, and legal holidays shall be counted.

“Filed” means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m. local time.

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“Protest,” as used in this subpart, means a written objection by an interested party to a solicitation by an agency for offers for a proposed contract for the acquisition of supplies or services or a written objection by an interested party to a proposed award or the award of such a contract.

“Protest,” as used in this subpart, means a written objection by an interested party to **any of the following:**

(a) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.

(b) The cancellation of the solicitation or other request.

(c) An award or proposed award of the contract.

(d) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.
[FAC 90-32]

33.102 General.

FAR as of FAC 90-25

(a) Contracting officers shall consider all protests, whether submitted before or after award and whether filed directly with the agency, the General Accounting Office (GAO), or for automatic data processing acquisitions under 40 U.S.C. 759 (~~hereinafter cited as~~ “ADP contracts”), the General Services Board of Contract appeals (GSBCA). ~~The protestor shall be notified in writing of the final decision of the protest.~~ (See 19.302 for protests of small business status and 22.608-3 for protests involving eligibility under the Walsh-Healey Public Contracts Act.)

FAR as revised

(a) Contracting officers shall consider all protests **and seek legal advice**, whether **protests are** submitted before or after award and whether filed directly with the agency, the General Accounting Office (GAO), or for automatic data processing acquisitions under 40 U.S.C. 759 (ADP contracts), the General Services Board of Contract Appeals (GSBCA **or the Board**). (See 19.302 for protests of small business status and 22.608-3 for protests involving eligibility under the Walsh-Healey Public Contracts Act.)

(b) If in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency may—

(1) Take any action that could have been recommended by the Comptroller General in the event of a GAO protest; and

(2) Pay appropriate costs as stated in 33.104(h).

(3) Require the awardee to reimburse the Government’s costs, as provided in this paragraph, where a postaward protest is sustained as the result of an awardee’s intentional or negligent misstatement, misrepresentation, or miscertification. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

(i) When a protest is sustained by GAO or GSBCA under circumstances that may allow the Government to seek reimbursement for protest costs, the contracting officer will determine whether the protest was sustained based on the awardee’s negligent or intentional misrepresentation. If the protest was sustained on several issues, protest costs shall be apportioned according to the costs attributable to the awardee’s actions.

(ii) The contracting officer shall review the amount of the debt, degree of the awardee’s fault, and costs of collection, to determine whether a demand for reimbursement ought to be made. If it is in the best interests of the Government to seek reimbursement, the contracting officer shall notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary. Prior to issuing a final decision, the contracting officer shall afford the contractor an

opportunity to inspect and copy agency records pertaining to the debt to the extent permitted by statute and regulation, and to request review of the matter by the Head of the Contracting Activity.

(iii) When appropriate, the contracting officer shall also refer the matter to the agency debarment official for consideration under Subpart 9.4.

~~(b)~~ * * * * *

(c) * * * * *

(d) **Protest likely after award.** The contracting officer may stay performance of a contract within the time period contained in subparagraph 33.104(c)(1) if the contracting officer makes a written determination that—

- (1) A protest is likely to be filed; and
- (2) Delay of performance is, under the circumstances, in the best interests of the United States.

~~(e)~~ * * * * *

(e) * * * * *

(1) * * * * *

(1) * * * * *

(2) May protest to the GAO in accordance with GAO regulations (4 CFR Part 21). An interested party who has filed a protest regarding an ADP contract with the GAO may not file a protest with the GSBCA with respect to that ~~contract~~;

(2) May protest to the GAO in accordance with GAO regulations (4 CFR Part 21). An interested party who has filed a protest regarding an ADP procurement with the GAO may not file a protest with the GSBCA with respect to that

procurement.

(3) May protest to the GSBCA regarding an award of an ADP contract in accordance with GSBCA Rules of Procedure (48 CFR Chapter 61). An interested party who has filed a protest regarding an ADP ~~contract~~ with GSBCA (40 U.S.C. 759~~(h)~~) may not file a protest with the GAO with respect to that ~~contract~~.

(3) May protest to the GSBCA regarding an award of an ADP contract in accordance with GSBCA Rules of Procedure (48 CFR Chapter 61). An interested party who has filed a protest regarding an ADP **procurement** with GSBCA (40 U.S.C. 759~~(f)~~) may not file a protest with the GAO with respect to that **procurement**.

[FAC 90-32]

33.103 Protests to the agency.

FAR as of FAC 90-25

FAR as revised

(a) * * * * *

(a) * * * * *

(b) (1) Agency protests may be submitted by interested parties to the individual ~~or~~ location designated in the provision at 52.233-2, Service of Protest. The designated person is normally the contracting officer.

(b) (1) Agency protests may be submitted by interested parties to the individual **and** location designated in the provision at 52.233-2, Service of Protest. The designated person is normally the contracting officer.

(2) Protests based on alleged improprieties in a solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for

(2) Protests based on alleged improprieties in a solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for

receipt of proposals. In all other cases, protests shall be filed not later than ~~10 working~~ days after the basis of protest is known or should have been known, whichever is earlier. The agency for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider any protest which is not filed timely.

(3) * * * * *

(4) Protests shall be concise, and logically presented to facilitate review by the agency. Failure to comply with any of the above requirements may be grounds for dismissal of the protest.

receipt of proposals. In all other cases, protests shall be filed not later than **14** days after the basis of protest is known or should have been known, whichever is earlier. The agency for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider **the merits of** any protest which is not filed timely.

(3) * * * * *

(4) Protests shall be concise, and logically presented to facilitate review by the agency. Failure to **substantially** comply with any of the above requirements may be grounds for dismissal of the protest.

(5) The agency should furnish a copy of the written protest ruling to the protester by certified mail return receipt requested, or by any other method that provides evidence of receipt. [FAC 90-32]

33.104 Protests to GAO.

FAR as of FAC 90-25

~~—This section implements the GAO's Bid Protest Regulations set forth at 4 CFR Part 21.~~

(a) *General procedures.* (1) A ~~protester~~ is required to furnish a copy of its complete protest to the official ~~or~~ location designated in the solicitation ~~or~~, in the absence of such a designation, to the contracting officer, so it is received no later than 1 ~~work~~ day after the protest is filed with the GAO. The GAO may dismiss the protest if the ~~protester~~ fails to furnish a complete copy of the protest within 1 ~~work~~ day.

(2) Immediately after receipt of the GAO's written notice that a protest has been filed, the agency shall give notice of the protest to the contractor if the award has been made, or, if no award has been made, to all parties who appear to have a ~~substantial and~~ reasonable prospect of receiving award if the protest is denied. * * * * * (i) * * * * * (ii) * * * * *

FAR as revised

Procedures for protests at the GAO are found at 4 CFR Part 21 (GAO Bid Protest Regulations). In the event guidance concerning GAO procedure in this section conflicts with 4 CFR Part 21, 4 CFR Part 21 governs.

(a) *General procedures.* (1) A **protester** is required to furnish a copy of its complete protest to the official **and** location designated in the solicitation **and**, in the absence of such a designation, to the contracting officer, so it is received no later than 1 day after the protest is filed with the GAO. The GAO may dismiss the protest if the **protester** fails to furnish a complete copy of the protest within 1 day. [FAC 90-32, CASE 94-730]

(2) Immediately after receipt of the GAO's written notice that a protest has been filed, the agency shall give notice of the protest to the contractor if the award has been made, or, if no award has been made, to all parties who appear to have a reasonable prospect of receiving award if the protest is denied. * * * * * (i) * * * * * (ii) * * * * *

However, if the protester has identified sensitive information and requests a protective order, then the contracting officer shall obtain a redacted version from the protester to furnish to other interested parties if one has not already been provided.

(3)(i) Upon notice that a protest has been filed with the GAO, the contracting officer shall immediately begin compiling the information necessary for a report to the GAO. The agency shall submit a complete report to the GAO within ~~25~~ **35** work days after the GAO notifies the agency by telephone that a protest has been filed, or within ~~40~~ **20** work days after receipt from the GAO of a determination to use the express option, unless the GAO—

(A) * * * * *

(B) Authorizes a longer period in response to an agency's ~~written~~ request for an extension. Any new date ~~shall be~~ documented in the agency's ~~protest~~ file.

(3)(i) Upon notice that a protest has been filed with the GAO, the contracting officer shall immediately begin compiling the information necessary for a report to the GAO. The agency shall submit a complete report to the GAO within **35** days after the GAO notifies the agency by telephone that a protest has been filed, or within **20** days after receipt from the GAO of a determination to use the express option, unless the GAO—

(A) * * * * *

(B) Authorizes a longer period in response to an agency's request for an extension. Any new date **is** documented in the agency's file.

(ii) When a protest is filed with the GAO, and an actual or prospective offeror so requests, the procuring agency shall, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the protest file. However, if the GAO dismisses the protest before the documents are submitted to the GAO, then no protest file need be made available. Information exempt from disclosure under 5 U.S.C. 552 may be redacted from the protest file. The protest file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submittal of an agency report to the GAO. The protest file shall include an index and as appropriate—

- (A) The protest;
- (B) The offer submitted by the ~~protesting~~ **offeror**;
- (C) The offer ~~which is~~ being considered for award or ~~which is~~ being protested;
- (D) All evaluation documents;
- (E) The solicitation, including the specifications or portions relevant to the protest;
- (F) The abstract of offers or relevant portions;
- (G) Any other documents that the agency

- (A) The protest;
- (B) The offer submitted by the **protester**;
- (C) The offer being considered for award or being protested;
- (D) All **relevant** evaluation documents;
- (E) The solicitation, including the specifications or portions relevant to the protest;
- (F) The abstract of offers or relevant portions;
- (G) Any other documents that the agency determines are relevant to the protest, **including documents specifically requested by the**

determines are relevant to the protest;

~~—(ii) The agency report to the GAO shall include, as appropriate, a copy of—~~

~~—(H) The contracting officer's signed statement setting forth findings, actions, and recommendations and any additional evidence or information deemed necessary in determining the validity of the protest. The statement shall be fully responsive to the allegation of the protest. If the contract action or contract performance continues after receipt of the protest, the report will include the determination(s) prescribed in paragraphs (b) or (c) of this section;~~

~~—(J) A list of the documents withheld from the protestor and other interested parties, and the reasons for withholding them. The list shall identify any documents specifically requested by, and withheld from, the protestor.~~

~~—(I) A list identifying the other parties who are being provided copies of the report; and~~

~~(iii) In addition to the documents contained in the report, the agency shall make available to the GAO any documents specifically requested by the protestor.~~

(4)(i) At the same time the agency submits its report to the GAO, the agency shall furnish copies of its report to the protestor and other interested parties who have responded to the notice given under subparagraph (a)(2) of this section. A party shall receive all relevant documents, except—

(A) * * * *

(B) Protestor's documents which the agency determines, pursuant to law or regulation, to withhold from any interested party.

(ii)(A) If, within 2 work days after receipt of the agency report, the protestor requests additional documents, the agency shall provide the requested documents to the GAO within 5 work days of receipt of the request.

(B) The additional documents shall also be provided to the protestor and other interested parties within this 5-work day period unless the agency has decided to withhold them for any reason (see

protester;

(iii) The agency report to the GAO shall include—

(A) A copy of the documents described in 33.104(a)(3)(ii);

(B) The contracting officer's signed statement of relevant facts and a memorandum of law. The contracting officer's statement shall set forth findings, actions, and recommendations, and any additional evidence or information not provided in the protest file that may be necessary to determine the merits of the protest.

(C) A list of the documents withheld from the protestor, or intervenors, and the reasons for withholding them. The list identifies any documents specifically requested by, and withheld from, the protestor; and

(D) A list of parties being provided the documents.

(4)(i) At the same time the agency submits its report to the GAO, the agency shall furnish copies of its report to the protestor **and any intervenors**. A party shall receive all relevant documents, except—

(A) * * * *

(B) **Protester's** documents which the agency determines, pursuant to law or regulation, to withhold from any interested party.

(ii)(A) If the **protester** requests additional documents within 2 days after **the protestor knew the existence or relevance of additional documents, or should have known**, the agency shall provide the requested documents to the GAO within 5 days of receipt of the request.

(B) The additional documents shall also be provided to the **protester** and other interested parties within this 5-day period unless the agency has decided to withhold them for any reason (see

subdivision (a)(4)(i) of this section). This includes any documents covered by a protective order issued by the GAO. Documents covered by a protective order shall be provided only in accordance with the terms of the order. ~~A request for a protective order to cover the additional documents shall be made in accordance with 33.104(a)(5) within this 5-work day period.~~

(C) The agency shall notify the GAO of any documents withheld from the ~~protestor~~ and other interested parties and shall state the reasons for withholding them.

(5) The GAO may issue a protective order to ~~limit the release of particular documents to counsel for the protestor and to counsel for the other interested parties entitled to receive the documents if the documents contain information that is privileged, or if their release would create a competitive advantage.~~

(i) *Requests for protective orders.* Any party seeking issuance of a protective order shall file its request with the GAO as soon as practicable after the protest is filed, ~~but not more than 20 work days after the protest filing date,~~ with copies furnished simultaneously to all parties.

(ii) *Exclusions and rebuttals.* Within 2 ~~work~~ days after receipt of a copy of the protective order request, any party may file with the GAO a request that particular documents be excluded from the coverage of the protective order, or that particular parties or individuals be included in or excluded from the protective order. Copies of the request shall be furnished simultaneously to all parties. ~~Within 1 work day after receipt of a copy of the request, any rebuttal shall be filed with the GAO, with copies furnished simultaneously to all parties.~~

(iii) *Additional documents.* If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party may request that these additional documents be covered by the protective order. Any party to the protective order also may request that individuals not

subdivision (a)(4)(i) of this section). This includes any documents covered by a protective order issued by the GAO. Documents covered by a protective order shall be provided only in accordance with the terms of the order.

(C) The agency shall notify the GAO of any documents withheld from the **protester** and other interested parties and shall state the reasons for withholding them.

(5) The GAO may issue protective orders **which establish terms, conditions, and restrictions for the provision of any document to an interested party. Protective orders prohibit or restrict the disclosure by the party of procurement sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the United States Congress or an executive agency.**

(i) *Requests for protective orders.* Any party seeking issuance of a protective order shall file its request with the GAO as soon as practicable after the protest is filed, with copies furnished simultaneously to all parties.

(ii) *Exclusions and rebuttals.* With 2 days after receipt of a copy of the protective order request, any party may file with the GAO a request that particular documents be excluded from the coverage of the protective order, or that particular parties or individuals be included in or excluded from the protective order. Copies of the request shall be furnished simultaneously to all parties.

(iii) *Additional documents.* If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party may request that these additional documents be covered by the protective order. Any party to the protective order also may request that individuals not

already covered by the protective order be included in the order. Requests shall be filed with the GAO, with copies furnished simultaneously to all parties. ~~Any rebuttal to such a request must be filed within 1 work day after receipt of a copy of the request.~~

(iv) * * * * *

(6) The ~~protestor~~ and other interested parties are required to furnish a copy of any comments on the agency report directly to the GAO within ~~10 work days, 5 work days~~ if express option is used, after receipt of the report, with copies provided to the contracting officer and to other participating interested parties. If a hearing is held, these comments are due within ~~7 work~~ days after the hearing.

* * * * *

(b)(1)(ii) Award is likely to occur within 30 ~~calendar~~ days of the written finding.

* * * * *

(c) *Protests after award.* (1) When the agency receives notice of a protest from the GAO after ~~award of a contract, but within 10 calendar days after award,~~ the contracting officer shall immediately suspend performance or terminate the awarded contract, except as provided in paragraphs (c)(2) and (3) of this section.

* * * * *

(5) When the agency receives notice of a protest filed with the GAO ~~more than 10 calendar days after award of the protested acquisition,~~ the contracting officer need not suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

(d) *Findings and notice.* If the decision is to proceed with contract award, or continue contract performance under paragraphs (b) or (c) of this section, the contracting officer shall include the written findings or other required documentation in the file. The contracting officer also shall give written notice of the decision to the ~~protestor~~ and other interested parties.

already covered by the protective order be included in the order. Requests shall be filed with the GAO, with copies furnished simultaneously to all parties.

(iv) * * * * *

(6) The **protester** and other interested parties are required to furnish a copy of any comments on the agency report directly to the GAO within **14** days, **7** days if express option is used, after receipt of the report, with copies provided to the contracting officer and to other participating interested parties. If a hearing is held, these comments are due within 7 days after the hearing.

* * * * *

(b)(1)(ii) Award is likely to occur within 30 days of the written finding.

* * * * *

(c) *Protests after award.* (1) When the agency receives notice of a protest from the GAO **within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.1004, whichever is later,** the contracting officer shall immediately suspend performance or terminate the awarded contract, except as provided in **sub**paragraphs (c)(2) and (3) of this section.

* * * * *

(5) When the agency receives notice of a protest filed with the GAO **after the dates contained in subparagraph (c)(1),** the contracting officer need not suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

(d) *Findings and notice.* If the decision is to proceed with contract award, or continue contract performance under paragraphs (b) or (c) of this section, the contracting officer shall include the written findings or other required documentation in the file. The contracting officer also shall give written notice of the decision to the **protester** and other interested parties.

(e) *Hearings.* The GAO may hold a hearing at the request of the agency, a ~~protestor~~, or other interested party who has responded to the notice in 33.104(a)(2). ~~The GAO may designate representatives of the parties to attend the hearing. The attending parties and the hearing official may question representatives of the parties at the hearing.~~ A recording or transcription of the hearing will normally be made, and copies may be obtained from the GAO for a fee. All parties may file comments on the hearing and report within 7 ~~work~~ days of the hearing.

(f) *GAO decision time.* GAO ~~will~~ issue its recommendation on a protest within 90 ~~work~~ days from the date of filing of the protest with the GAO, or within 45 ~~calendar~~ days under the express option, unless GAO establishes a longer period of time.

(g) *Notice to GAO.* ~~The head of the agency or a designee (not below the level of the head of the contracting activity) responsible for the solicitation, proposed award, or award of the contract shall report to the Comptroller General within 60 calendar days of receipt of the GAO's recommendation if the agency has decided not to comply with the recommendation. The report shall explain the reasons why the GAO's recommendation, including any recommendation concerning the award of protest costs (i.e., the costs of filing and pursuing the protest, including reasonable attorneys' fees and bid and proposal preparation), will not be followed by the agency.~~

(h) *Award of protest costs.* Pending a final, nonappealable judicial determination of the constitutionality of 31 U.S.C. section 3554(e), a recommended award of protest costs (as defined under paragraph (g) of this section) may be paid by the agency out of funds available to or for the use of the agency for the acquisition of supplies or services, but such payments may be subject to recoupment by the agency if 31 U.S.C. section 3554(e) is judicially determined not to be constitutional. Before paying a recommended award of protest costs (as defined under paragraph (g) of this section), agency personnel should consult the General Counsel's office of the

(e) *Hearings.* The GAO may hold a hearing at the request of the agency, a **protester**, or other interested party who has responded to the notice in paragraph (a)(2) **of this section**. A recording or transcription of the hearing will normally be made, and copies may be obtained from the GAO. All parties may file comments on the hearing and report within 7 days of the hearing.

(f) *GAO decision time.* GAO issues its recommendation on a protest within **125** days from the date of filing of the protest with the GAO, or within **65** days under the express option. **The GAO attempts to issue its recommendation on an amended protest that adds a new ground of protest within the time limit of the initial protest. If an amended protest cannot be resolved within the initial time limit, the GAO may resolve the amended protest through an express option.**

(g) *Notice to GAO.* **If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the head of the contracting activity responsible for that contract shall report the failure to the GAO not later than 5 days after the expiration of the 60 day period.** The report shall explain the reasons why the GAO's recommendation **exclusive of costs, has not been** followed by the agency.

(h) *Award of costs.* **(1) If the GAO determines that a solicitation for a contract or a proposed award or an award of a contract does not comply with a statute or regulation, the GAO may recommend that the agency pay to an appropriate protester the cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant and expert witness fees, and bid and proposal preparation costs. The agency shall use funds available for the procurement to pay the costs awarded.**

agency. ~~This paragraph (h) applies to all recommended awards of protest costs (as defined under paragraph (g) of this section) which have not yet been paid.~~

(2) If the GAO recommends the award of costs to an interested party, the agency shall attempt to reach an agreement on the amount of the cost to be paid. If the agency and the interested party are unable to agree on the amount to be paid, GAO may, upon request of the interested party, recommend to the agency the amount of cost that the agency should pay.

(3) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 19.001, "Small business concern"), costs under paragraph (h)(2) of this section—

(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C. 3109 and Expert and Consultant Appointments, 60 FR 45649, September 1, 1995 (304.105); or

(ii) For attorneys' fees that exceed \$150 per hour unless the agency determines, based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a "reasonable" level for attorneys' fees for small businesses.

(4) A recommended award of costs may be paid by the agency out of funds available to or for the use of the agency for the acquisition of supplies or services. Before paying a recommended award of costs, agency personnel should consult legal counsel. Section 33.104(h) applies to all recommended awards of costs which have not yet been paid.

(5) If the GAO recommends the agency pay costs (as defined under paragraph (h)(1) of this section) and the agency does not promptly pay the costs, the agency shall promptly report to GAO the reasons for the failure to follow the GAO recommendation.

(6) Any costs the contractor receives under this section shall not be the subject of subsequent proposals, billings, or

claims against the Government and those exclusions should be reflected in the cost agreement.

(7) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government. [FAC 90-32]

33.105 Protests to GSBICA.

FAR as of FAC 90-25

FAR as revised

Procedures for protests at the GSBICA, are found at 48 CFR Chapter 61 (GSBICA Rules). In the event guidance concerning GSBICA procedure in this subpart conflicts with 48 CFR Chapter 61, 48 CFR Chapter 61 governs.

(a)(1) ~~An interested party may protest an ADP acquisition subject to Section 111 of the Federal Property and Administrative Services Act (40 U.S.C. 759) by filing a protest with the GSBICA. ADP acquisition protests not covered under this statute may not be heard by the GSBICA, but may be heard by the agency, the courts, or GAO. A protester shall furnish a copy of its complete protest to the official or location designated in the solicitation, or in the absence of such a designation to the contracting officer, on the same day the protest is filed with the GSBICA. Any request for a hearing on either a suspension of procurement authority or on the merits shall be in the protest.~~

(a)(1) Upon request of an interested party in connection with any procurement that is subject to Section 111 of the Federal Property and Administrative Services Act (40 U.S.C. 759), the GSBICA reviews any decision by the contracting officer that is alleged to violate a statute, a regulation, or the conditions of a delegation of procurement authority. ADP acquisition protests not covered under this section may not be heard by the GSBICA, but may be heard by the agency, the courts, or GAO. A **protester** shall furnish a copy of its complete protest to the official and location designated in the solicitation, or in the absence of such a designation, to the contracting officer on the same day the protest is filed with the GSBICA. Any request for a hearing on either a suspension of procurement authority or on the merits shall be in the protest.

(2) The GSBCA procedures state that—
(i) Within one ~~working~~ day after receipt of a copy of the protest, the agency shall give either oral or written notice of the protest to all parties who were solicited or, if the solicitation has closed, only to those who submitted a sealed bid or offer; and

(ii) Written confirmation of notice and a listing of all persons and agencies receiving notice should be given to the Board within ~~5-working~~ days after receipt of the protest.

* * * * *

(b)(6) A copy of the solicitation, the ~~protestor's~~ bid or proposal and, if bid opening has occurred and no contract has been awarded, a copy of any relevant bids and the bid abstract.

* * * * *

(c) The GSBCA procedures state that within ~~15~~ work days after the filing of the protest, or such longer time as the Board may establish, the agency shall submit its answer to the Board setting forth its defenses to the protest and its findings, actions, and recommendations in the matter.

(d)(1) If a protest contains a timely request for a suspension of procurement authority, ~~a hearing will be held whenever practicable but not later than 10 calendar days after the filing of the protest. The Board shall suspend the procurement authority unless the agency establishes that—~~

(i) Absent suspension, the contract award is likely within 30 ~~calendar~~ days; and

* * * * *

(e) A hearing on the merits, if requested, will be held within ~~25-work~~ days after the filing of the protest and a GSBCA decision on the merits will be

(2) The GSBCA procedures state that—
(i) Within one work day after receipt of a copy of the protest, the agency shall give either oral or written notice of the protest to all parties who were solicited or, if the solicitation has closed, only to those who submitted a sealed bid or offer; and

(ii) Written confirmation of notice and a listing of all persons and agencies receiving notice should be given to the Board within **3** work days after receipt of the protest.

* * * * *

(b)(6) A copy of the solicitation, the **protester's** bid or proposal and, if bid opening has occurred and no contract has been awarded, a copy of any relevant bids and the bid abstract.

* * * * *

(c) The GSBCA procedures state that within **10** work days after the filing of the protest, or such longer time as the Board may establish, the agency shall submit its answer to the Board setting forth its defenses to the protest and its findings, actions, and recommendations in the matter.

(d)(1) If a protest contains a timely request for a suspension of procurement authority, **the Board will hold a hearing, unless the agency does not contest an order suspending its procurement authority. A timely request for suspension of procurement authority is one that is filed before award, within 10 days of award, or within five days of the offered debriefing, when the debriefing is required by 15.1004, whichever applies.** The Board suspends the procurement authority unless the agency establishes that—

(i) Absent suspension, the contract award is likely within 30 days; and

* * * * *

(4) A suspension shall not preclude the agency concerned from continuing the procurement process up to but not including the award of the contract unless the Board determines the action is not in the best interests of the United States.

(e) A hearing on the merits, if requested, will be held within **35** days after the filing of the protest and a GSBCA decision on the merits will be issued

issued within ~~45 work~~ days, unless the Board's chairman determines a longer period is required.

within **65** days, unless the Board's chairman determines a longer period is required

(f) Any agreement that provides for the dismissal of a protest and involves a direct or indirect expenditure of appropriated funds shall be made part of the public record (subject to any protective order considered appropriate by the Board) before dismissal of the protest. If an agency is party to a settlement agreement, the submission of the agreement to the Board shall include a memorandum, signed by the contracting officer concerned, that describes in detail the procurement, the grounds for protest, the Government's position regarding the grounds for protest, the terms of the settlement, and the agency's position regarding the propriety of the award or proposed award of the contract at issue in the protest.

~~(f)~~(1) The GSBCA may declare an appropriate ~~interested~~ party to be entitled to the costs of—

- (i) Filing and pursuing the protest, including reasonable attorney's fees; and
- (ii) Bid and proposal preparation.

(2) Costs awarded under subparagraph ~~(f)~~(1) of this section shall be paid out in accordance with the procedures provided in 31 U.S.C. 1304 (the Permanent Indefinite Judgment Fund).

(g)(1) The GSBCA may declare an appropriate prevailing party to be entitled to the cost, exclusive of profit, of—

- (i) Filing and pursuing the protest, including reasonable attorney, consultant and expert witness fees; and**
- (ii) Bid and proposal preparation.**

(2) Costs awarded under subparagraph (g)(1) of this section, or payments of amounts due under settlement agreements, shall be paid out in accordance with the procedures provided in 31 U.S.C. 1304 (the Permanent Indefinite Judgment Fund). The agency concerned shall reimburse that fund out of funds available for the procurement.

(3) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 19.001, "Small business concern"), costs under subparagraph (g)(1) of this section for—

- (i) Consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C. 3109 and Expert and Consultant Appointments, 60 FR 45649, September 1, 1995 (CFR 304.105); or**

(ii) Attorneys' fees that exceed \$150 per hour unless the Board determines, on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a "reasonable" level for attorneys' fees for small businesses.

(4) Within 30 days after receipt by the agency of an application for costs, the agency may file an answer.

(5) If the Government pays costs, as provided in paragraph (g)(1) of this section, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government

~~(g)~~The GSBICA's final decision may be appealed by the agency or by any interested party, including any intervening interested parties, as set forth in ~~Subpart 33.2.~~

(h) The GSBICA's final decision may be appealed by the agency or by any interested party, including any intervening interested parties, as set forth in **the Contract Disputes Act of 1978 (41 U.S.C. 601-613).** [FAC 90-32]

33.201 Definitions.

FAR as of FAC 90-25

FAR as revised

"Accrual of a claim" occurs on the date when all events, which fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

“Alternative ~~means~~ of dispute resolution (ADR)” means any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation. These procedures include, but are not limited to, assisted settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration.

“Claim,” as used in this part, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$50,000 is not a claim under the Contract Disputes Act of 1978 until certified as required by the Act and 33.207. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

* * * * *

“Alternative dispute resolution (ADR)” means any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation. These procedures **may** include, but are not limited to, assisted settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration.

“Claim” as used in this part, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the contractor seeking the payment of money exceeding **\$100,000** is not a claim under the Contract Disputes Act of 1978 until certified as required by the Act and 33.207. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

* * * * * [FAC 90-32]

33.206 Initiation of a claim.

FAR as of FAC 90-25

(a) Contractor claims shall be submitted in writing to the contracting officer for a decision. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor.

FAR as revised

(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision **within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995.** The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor **within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government claim based on a contractor claim involving fraud.** [FAC 90-32]

33.207 Contractor certification.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) Contractors shall provide the certification specified in 33.207(c) when submitting any claim— (1) Exceeding \$50,000 ; or * * * * *	(a) Contractors shall provide the certification specified in 33.207(c) when submitting any claim— (1) Exceeding \$100,000 ; or * * * * *
(d) The aggregate amount of both the increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met (see example in 15.804-2(a)(1)(ii) regarding cost or pricing data).	(d) The aggregate amount of both increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met (see example in 15.804-2(a)(1)(iii) regarding cost or pricing data). [FAC 90-32]

33.208 Interest on claims.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
* * * * *	* * * * *
(c) With regard to claims having defective certifications, as defined in 33.201 , interest shall be paid from either the date that the contracting officer initially receives the claim or October 29, 1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29, 1992, after submission of a defective certificate, interest shall be paid from the date of receipt by the Government of a proper certificate.	(c) With regard to claims having defective certifications, interest shall be paid from either the date that the contracting officer initially receives the claim or October 29, 1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29, 1992, after submission of a defective certificate, interest shall be paid from the date of receipt by the Government of a proper certificate. [FAC 90-32]

33.211 Contracting officer's decision.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer shall— * * * * *	(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer shall— * * * * *
(4) Prepare a written decision that shall include a— * * * * *	(4) Prepare a written decision that shall include a— * * * * *
(v) Paragraph substantially as follows: “This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and	(v) Paragraph substantially as follows: “This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and

provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claim procedure for claims of ~~\$10,000~~ or less or its accelerated procedure for claims of ~~\$50,000~~ or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision"; and

* * * * *

(c) The contracting officer shall issue the decision within the following statutory time limitations:

(1) For claims of ~~\$50,000~~ or less, 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.

(2) For claims over ~~\$50,000~~, 60 days after receiving a certified claim; *provided, however*, that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that period, of the time within which a decision will be issued.

* * * * *

(e) The contracting officer shall have no obligation to render a final decision on any claim exceeding ~~\$50,000~~ which contains a defective certification, if within 60 days after receipt of the claim, the contracting officer notifies the contractor, in writing, of the reasons why any attempted certification was found to be defective.

(f) In the event of undue delay by the contracting officer in rendering a decision on a claim, the contractor may request the ~~agency-BCA~~ to direct the contracting officer to issue a decision in a specified time period determined by the ~~BCA~~.

* * * * *

provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claim procedure for claims of **\$50,000** or less or its accelerated procedure for claims of **\$100,000** or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision"; and

* * * * *

(c) The contracting officer shall issue the decision within the following statutory time limitations:

(1) For claims of **\$100,000** or less, 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.

(2) For claims over **\$100,000**, 60 days after receiving a certified claim; *provided, however*, that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that period of the time within which a decision will be issued

* * * * *

(e) The contracting officer shall have no obligation to render a final decision on any claim exceeding **\$100,000** which contains a defective certification, if within 60 days after receipt of the claim, the contracting officer notifies the contractor, in writing, of the reasons why any attempted certification was found to be defective.

(f) In the event of undue delay by the contracting officer in rendering a decision on a claim, the contractor may request the **tribunal concerned** to direct the contracting officer to issue a decision in a specified time period determined by the **tribunal**.

[FAC 90-32]

* * * * *

33.214 Alternative dispute resolution (ADR).

FAR as of FAC 90-25

(a) * * * * *

FAR as revised

(a) * * * * *

(b) If the contracting officer rejects a request for ADR from a small business contractor, the contracting officer shall

provide the contractor written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

(b) * * * * *
(c) * * * * *
(d) * * * * *

(c) * * * * *
(d) * * * * *
(e) * * * * *
[FAC 90-32]

52.233-1 Disputes.

FAR as of FAC 90-25

As prescribed in 33.215, insert the following clause:

DISPUTES (~~MAR 1994~~)

* * * * *

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$50,000 is not a claim under the Act until certified as required by subparagraph (d)(2) below. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

FAR as revised

As prescribed in 33.215, insert the following clause:

DISPUTES (**OCT 1995**)

* * * * *

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding **\$100,000** is not a claim under the Act until certified as required by subparagraph (d)(2) **of this clause**. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and, **unless otherwise stated in this contract**, submitted **within 6 years after accrual of the claim** to the Contracting Officer for a written decision. A claim by the Government

against the Contractor shall be subject to a written decision by the Contracting Officer.

(2)(i) Contractors shall provide the certification specified in subparagraph (d)(2)(iii) of this clause when submitting any claim—

(A) Exceeding \$50,000; or

* * * * *

(e) For Contractor claims of \$50,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$50,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

* * * * *

(g) ~~At the time a~~ claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use ADR. When using arbitration conducted pursuant to 5 U.S.C. 575-580, or when using any other ADR technique that the agency elects to handle in accordance with the ADRA, any claim, regardless of amount, shall be accompanied by the certification described in subparagraph (d)(2)(iii) of this clause, and executed in accordance with subparagraph (d)(3) of this clause.

* * * * *

(2)(i) Contractors shall provide the certification specified in subparagraph (d)(2)(iii) of this clause when submitting any claim—

(A) Exceeding \$100,000; or

* * * * *

(e) For Contractor claims of \$100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

* * * * *

(g) **If the** claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use ADR. **If the Contractor refuses an offer for alternative disputes resolution, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the request.** When using arbitration conducted pursuant to 5 U.S.C. 575-580, or when using any other ADR technique that the agency elects to handle in accordance with the ADRA, any claim, regardless of amount, shall be accompanied by the certification described in subparagraph (d)(2)(iii) of this clause, and executed in accordance with subparagraph (d)(3) of this clause.

* * * * * [FAC 90-32]

52.233-2 Service of Protest.

FAR as of FAC 90-25

As prescribed in 33.106, insert the following provision:

SERVICE OF PROTEST (NOV 1988)

* * * * *

(End of provision)

FAR as revised

As prescribed in 33.106, insert the following provision:

SERVICE OF PROTEST (OCT 1995)

* * * * *

(c) In this procurement, you may not protest to the GSBCA because of the nature of the supplies or services being procured. (Contracting Officer shall strike the word "not" where the GSBCA is a correct forum.) [FAC 90-32]

(End of provision)

52.233-3 Protest after Award.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
As prescribed in 33.106(b), insert the following clause: PROTEST AFTER AWARD (AUG 1989)	As prescribed in 33.106(b), insert the following clause: PROTEST AFTER AWARD (OCT 1995)
<p>(a) Upon receipt of a notice of protest (as defined in 33.101 of the FAR) the Contracting Officer may, by written order to the Contractor, direct the Contractor to stop performance of the work called for by this contract. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Upon receipt of the final decision in the protest, the Contracting Officer shall either—</p> <p>* * * * *</p>	<p>(a) Upon receipt of a notice of protest (as defined in FAR 33.101) or a determination that a protest is likely (see FAR 33.102(d)), the Contracting Officer may, by written order to the Contractor, direct the Contractor to stop performance of the work called for by this contract. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Upon receipt of the final decision in the protest, the Contracting Officer shall either—</p> <p>* * * * *</p> <p>(f) If as the result of the awardee's intentional or negligent misstatement, misrepresentation, or miscertification, a protest related to this solicitation is sustained, and the Government pays costs, as provided in 33.102(b)(2), 33.104(h)(1), or 33.105(g)(1), the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government. [FAC 90-32]</p>